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IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 19478

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LO-VACA GATHERING COMPANY,
HOUSTON PIPELINE COMPANY,
EL PASO NATURAL GAS COMPANY,
*Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

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**On Joint Petition for Review of Opinion and Order of Federal Power Commission**

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## SUPPLEMENTAL JOINT APPENDIX

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## JOINT APPENDIX

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Jack Ware

was called as a witness and, having been first duly sworn, was examined and testified as follows:

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Cross-Examination

By Mr. Knight:

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Q. Do you know, Mr. Ware, or will you have any way of knowing after this project gets into operation what will happen to Lo-Vaca's gas after Lo-Vaca delivers that gas to El Paso Gas Supply Company? A. No, sir, I don't. I will rely on the contract and the integrity of El Paso Natural Gas to do what the contract says.

Presiding Examiner: You are not an engineer, are you? You are a lawyer?

The Witness: I am a lawyer, yes, sir.

Presiding Examiner: Can one selling property pass title to it and still keep control, or what happens to it after?

The Witness: Once title passes that is the end of

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control as far as I know the law or the facts or anything else to be.

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John H. Wimberly

was called as a witness, and having been first duly sworn, was examined and testified as follows:

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Mr. Knight: Is he going to withdraw Exhibit 3?

Mr. Giller: Whatever you gentlemen wish. Exhibit 3 is available. You have copies of it for use, but I do not wish it to be part of the record because it is bulky and has nothing to do, I do not believe, with the issues here

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involved, except this one particular clause.

Mr. Knight: I think we ought to have the entire contract in evidence, Your Honor, if we are going to have any part of it.

Mr. Giller: It has been passed out to everybody. They have copies and they could use it for whatever questions they ask of Mr. Wimberly, sir.

Presiding Examiner: You don't have to offer it in evidence. You have had it identified. It will remain in the record as identified. If anybody discovers anything else in it they want to offer in evidence I will listen to them at that time.

I don't believe it ought to be withdrawn. I believe it should stand in the record as an exhibit offered and marked for identification—not offered, but marked for identification.

Mr. Giller: Yes, sir.

Mr. Knight: Is it part of the record if it is not offered, either accepted or rejected?

Presiding Examiner: All he is offering it for is for this one excerpt. If anybody else finds something in this that they will want to offer, I will listen to them at that time, including Staff.

* * * * * * * * * * *

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Cross-Examination

By Mr. Knight:

. . . . . .

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Q. When Houston's gas is delivered near Three Rivers, Texas, into the pipeline of the El Paso Gas Supply Company, it will be commingled with gas delivered by Lo-Vaca Gathering company, will it not,— A. Yes, sir.

Q. —in El Paso's line? A. Yes, sir, I suppose so. And maybe from other sources of supply of El Paso, yes, sir.

. . . . . .

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Presiding Examiner: Have you any familiarity with this Exhibit B as attached to your petition for declaratory judgment?

The Witness: Just generally, Your Honor, as I say.

Presiding Examiner: This Phillips shown hero, is that the so-called Seminole?

The Witness: Well, now, at one time I did—it has been sometime ago. This contract was executed and these negotiations took place prior to July 1960, and I am not sure just where the location of—I see it here.

Presiding Examiner: Keystone Field mark. There isn't a mark about Phillips gasoline plant, which is located near Goldsmith there. Is that the so-called Seminole Field?

The Witness: I do not know, sir.

. . . . . .

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By Mr. Ormasa:

Q. Mr. Wimberly, we have been speaking a good bit yesterday and today about contractual provisions. I wonder if

you would mind turning for a moment at least to some of the fundamentals of the gas business, sir.

Now, assume, Mr. Wimberly, that at a common point we receive gas from two separate sources, would it be understandable if I refer to that as source X and source Y? A. Yes, sir.

Q. And if that gas proceeded through a pipeline and part of that gas was delivered to say, shall we say, a compressor station, can you tell we whether the gas delivered at the compressor station would be gas X or gas Y or gas X-Y?

Do you understand the question? A. Yes, sir, I understand it. I think I do. Physically, you mean?

Q. Physically. A. No, sir. I think it would probably be gas X-Y.

Q. Thank you. And that is typical of the operation of the gas pipeline business, is that correct? A. I think that is true, yes. Almost any gas pipeline has gas that comes from a number of sources.

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Q. And that is what we term commingling, is that correct, sir? A. Yes, sir, that is right.

Q. And as we add the number of different sources, we then add X-Y-Z, for example, for the gas being delivered at a particular point, is that correct? A. Yes, sir.

Q. Would you answer audibly, please? A. Yes, sir.

Q. Thank you.

Now, the gas that you deliver from your system to Three Rivers, of course is commingled gas, is that correct, sir? A. Yes, sir.

Q. It comes from various sources within your overall pipeline system within the State of Texas? A. That is right.

Q. And it is delivered to the facilities, as I understand

it, or would be, the facilities to be built by El Paso Gas Supply Company, is that correct, sir? A. That is correct.

Q. And that would not be the only gas to be received at those facilities, is that correct? A. It is my understanding that is correct, yes.

Q. Do you know what other gas would be received at

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those facilities at Three Rivers? A. Well, I have heard testimony here that some will be received from Lo-Vaca.

Q. And have you heard the testimony that two different titled types of gases will be received there from Lo-Vaca? A. Yes, sir.

Q. And could you describe those two different types?

Mr. Ross: I object, your Honor.

Mr. Ormasa: I think the objection is relevant. I withdraw my question.

By Mr. Ormasa:

Q. One of those under the testimony here has been subject to a restriction and the other portion of the gas has not, is that correct, sir? A. That is my understanding, yes.

Q. And that gas is proceeding then through a pipeline or will proceed through a pipeline to be built by El Paso Gas Supply, is that correct, sir? A. Yes, sir, that is my understanding.

Q. And it is my understanding that that gas then, this commingled gas will be used to supply certain compressor stations in the State of Texas? A. That is my understanding, that that will be the physical arrangement or that is actually what will happen physically, yes.

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Q. And actually, physically, that pipeline will connect with the El Paso Natural Gas pipeline at Sonora in Texas,

is that correct? A. In West Texas. I am not sure about the exact point.

Q. Are you familiar—strike that.

I will ask you to take a look at Exhibit No. 6, if you would, please, sir? Do you have that available to you? A. I have it. I am not very familiar with it.

Q. I wonder if we might take the time to examine it together, Mr. Wimberly. A. Yes, sir.

Q. Now, you will deliver gas at a point shown in the lower right hand portion of Exhibit 6 designated as Three Rivers, is that correct, sir? A. Yes, sir.

Q. And your pipeline will physically connect, will it not, with the proposed pipeline to be built by El Paso Gas Supply, the red dotted line set forth on that exhibit? A. That is what the map shows.

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Q. And the map further shows, does it not, a physical connection at Sonora with El Paso Natural Gas Company pipe line system? A. I think it does.

Q. Does it not? Do you want to take a moment to study it, sir? A. I wouldn't know any more about it than I have just said. It seems to. This red line does not touch the green line. I assume it connects there.

Q. All right.

And that green line proceeds on and makes connections with pipelines which apparently according to this exhibit proceed into the State of New Mexico. Is that correct, sir? A. Would you repeat that, please?

Mr. Ormasa: May we have the pending question read?

(Question read)

The Witness: Yes, sir.

* * * * * * * * * * *

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**Jack Ware**

resumed the witness stand and, having been previously duly sworn, testified further as follows:

Cross-Examination (Resumed)

By Mr. Ormasa:

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Q. And so far as you know, when you executed the contract of March 15, 1960, had you supplied all the needs of El Paso in so far as they have requested you to fulfill them?

Mr. Ross: May I have the question read back, please?

Presiding Examiner: It will be read.

(Question read)

The Witness: Do you mean the needs for their system use? Is that your question?

Mr. Ormasa: I was thinking of the need of gas from you.

The Witness: No, sir. That was evidenced by the fact that we, at the time we had signed the March contract, that we were already negotiating on the May contract.

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**Barry Hunsaker**

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

By Mr. Ormasa:

* * * * * * * * * * *

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Q. Can you tell me what the present cost of gas is at the Phillips plant?

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Presiding Examiner: I don't believe, in the first place, this witness would be competent to answer that. In the second place, it wasn't part of his direct. And in the third place, it has its place later in the case. You have your point on the record now, I think, as to what you intended to inquire about.

Mr. Ormasa: He has testified, Your Honor, and the exhibit shows that the Phillips Petroleum Company plant will purchase Houston gas for use as fuel, and that shows in his legend up there, and it also shows in the quantity that is attached to the Phillips station. So therefore he has opened himself, it seems to me, to the question as to whether in truth and in fact Houston gas will be used there, to the extent that I have indicated. I will submit to Your Honor's ruling.

Presiding Examiner: I don't believe there has been any claim from any of the people who testified that any particular molecules of gas to be used anywhere. That is my recollection at this point. A quantity will be used there and it will come from a commingled stream which originates down here at the lower right-hand corner of this Exhibit 7.

By Mr. Ormasa:

Q. Mr. Hunsaker, you have just been listening to the Examiner. Do you accept his statements? A. Yes, sir, I do.

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Q. Thank you. Now can you tell me, Mr. Hunsaker, what present volumes of gas are used at the Phillips station? A. By Phillips, or by El Paso?

Q. By El Paso. A. The volumes shown on Exhibit 7

represent, as I recall, our actual average daily volume for the year 1959.

Q. If I could broaden the scope of the question, would that be true as to each volume shown as attached to each existing station? A. Yes, that is correct.

Q. Now you testified, Mr. Hunsaker, if I understand it correctly, that the arrows on each of these exhibits, 7, 8, 9 and 10, represent actual flow along the pipeline; is that correct, sir? A. They represent what will be the actual flow under the operation of this project.

Q I ask you to turn then to Exhibit 7. If you will note up on the New Mexico-Texas border, south of the Wasson station, a juncture just east of the border of New Mexico. A. Yes.

Q. Then the arrow to the left, or generally to the southwest, says "To Pecos River". A. Yes.

Q. Does that represent the actual direction of flow?

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Q. Does that represent the present actual gas flow at that point? A. Most generally, yes, sir.

Q. Does it flow in both directions at present? A. Not normally. It may have on rare occasions.

Q. Is the normal flow from that juncture into Pecos River area? A. Yes, that is correct.

Q. Do you have the original Exhibit 7 in evidence? Where is the original Exhibit 7?

Presiding Examiner: I think it is received in evidence. I know it is, yes.

Mr. Ormasa: Do you have it there, Mr. Examiner?

Presiding Examiner: You want a copy of it?

Mr. Ormasa: I just wondered if we could mark this point so it would be quite clear in the record. May we mark this F-1, Mr. Examiner, the point just testified to?

Mr. Ross: Just one moment, please. If we are going to

start marking up exhibits, I believe we are all entitled to have copies of the marked-up exhibits, and I would like to have that understood before the witness proceeds.

Presiding Examiner: I think we all know where the point is, Mr. Ormasa.

Mr. Ormasa: If there is no confusion I won't bother to mark it. Everyone is clear as to the juncture—you are, Mr.

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Hunsaker?

The Witness: Yes.

Mr. Ross: You are asking whether all counsel are clear on that point?

Mr. Ormasa: Yes, I would want all counsel to be.

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By Mr. Ormasa:

Q. Do I interpret Exhibit 7 correctly, Mr. Hunsaker, that this gas, when it reaches Pecos River, proceeds on to Guadalupe in the State of Texas? A. Yes, that is correct.

Q. Now from what source is the gas obtained at the juncture just east of the New Mexico-Texas border? A. It is obtained from all of our sources within the State of Texas, that flow in that direction.

Q. And that, of course, would include the Houston-Lo-Vaca gas? A. Yes, it would.

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Q. Now when the gas reaches the Guadalupe station, does the 16-inch line proposed to be built from the Keystone area, will that physically connect with the five lines coming generally from the Pecos River down into Guadalupe? A. No, sir, it will not. It will connect with the fuel system at Guadalupe, and that is all.

Q. You will have two compressor stations at Guadalupe, is that correct? A. We will have two services there, not two stations. They will be in common buildings and in a common area.

Q. I don't understand too much about these technical aspects, Mr. Hunsaker. Could you explain this to me: What happens to those five lines that proceed into Guadalupe? A. They compress with the compressors at Guadalupe. They would come through the plant yard and each of them would be valved with a block valve and all of them would be manifolded on each side of the valve. They would take suction from one side, compress it, and discharge it downstream of the station block valve. Those compressors on the 16-inch line will do likewise, except that they will compress gas from that line and back into that line, only.

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Mr. Ormasa: I didn't understand that last part, Mr. Hunsaker.

The Witness: I said that those compressors which will serve the 16-inch line will operate in a similar fashion, except that they will compress gas from the 16-inch OD line back into the 16-inch OD line, only.

By Mr. Ormasa:

Q. That is, there is no physical manner by which gas could be switched from the compressor on the 16-inch line to the compressor station on the other lines?

The Witness: May I have the question read?

Presiding Examiner: Read the question, and we would like to get specifically also what location you are referring to.

Mr. Ormasa: I was referring to the Guadalupe station, Mr. Examiner.

(Question read)

The Witness: We haven't built it yet, Mr. Ormasa, so I can't answer that. It might be that we would have a common spare but it would be valved off so we could not do that.

By Mr. Ormasa:

Q. You mean it would be valved off so you would not do it, but if you wished to send it through another line, that you could do it: is that correct, sir? A. It is very hypothetical. We would not wish to do it because we would be losing a lot of pressure.

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Suppose you had one of your compressor stations down there for some reason or other, wouldn't the logical thing be to send the gas through the other compressor station? A. No, not necessarily. We will have at least a common spare on that, and it should suffice. If it doesn't, we will curtail operations as required.

Q. What do you mean by common spare? A. That is one particular engine that could be used on the 16-inch OD line, or on the California system, but not both simultaneously.

Q. So gas from either could flow through that one engine; is that correct? A. At your option, but not at the same time.

Q. In Exhibit 7, Guadalupe, where you show the two compressor stations, what is the little bracket joining the two circles that represent the compressor stations? A. There is an indicated fuel connection from the 16-inch OD line to the station.

Q. What does that fuel connection mean? What does that permit? A. That permits using gas from the 16-inch OD line for all of the fuel requirements of that station.

Q. When you refer to that station, you mean all the compressor stations there? A. I am sorry. Guadalupe. Both services, yes.

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Q. It could handle both compressors? A. Yes.

Q. Now isn't it also true that another source of gas ultimately flowing into Guadalupe starts at Keystone--I refer to Exhibit 7—starts at Keystone and proceeds to Pecos River, and then from Pecos River into Guadalupe? A. Yes, that is correct.

Q. Now that direction of flow would be just as true after the building of the 186169 as before; is that correct? A. Yes, that is correct.

Q. So physically, Houston, Lo-Vaca, and other gas you pick up in Texas would go through that line I just referred to? A. A portion of the commingled stream will do that.

Q. Now turning your attention to volumes for a moment, starting at Guadalupe, does that figure of 5,130,000 cubic feet per day, does that represent the total fuel used at the Guadalupe station? A. Yes, sir.

Q. How is that broken down between the two separate compressor stations? A. We have not broken it down, Mr. Ormasa. The service on the 16-inch OD line would use a small percentage of the total.

Q. Then if I understand you correctly, this represents

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the same volume as presently used, and just precisely how you would divide it you don't know at this time, but the lesser amount would be used for the 16-inch line? A. A far lesser amount. It would use approximately this volume every day.

Q. I don't know if I asked you this, Mr. Hunsaker, but does that volume represent the total fuel used at that station? A. Yes, sir, it does.

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Q. Can you tell me roughly what volume of gas is obtained from Lee County and is transmitted to Keystone main line station?

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Mr. Ormasa: Yes. I don't want any great precision on this. I want some idea as to what volume of gas goes from New Mexico to that Keystone plant. It could be a rough figure, an average day; whatever is easiest for the witness.

The Witness: Well, I think it could vary from nothing to 400 million a day or thereabouts. The average day may be 180 to 200 million cubic feet per day but it does vary tremendously.

By Mr. Ormasa:

Q. Is that a field line? A. I suppose you would call that a field transmission line. It is a 30-inch O.D. line that connects all of the JAL area plants to Keystone main line.

Q. Does that show on any of these exhibits? A. It shows on Exhibit 10.

Q. I wonder if you could point that out so it would be clear in the record what line that is, Mr. Hunsaker? A. Looking at the Keystone main line, there are two open circles directly north or towards the top of the flow

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diagram from the right-hand circle is a 30-inch O.D. line and you will see that identified as a 30-inch line.

That is the line that I am referring to.

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349

Q. Now, if I can call it to your attention, Mr. Hunsaker, there appears to be a line southerly from Eunice over

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to Fullerton. Do you see that, sir? A. There is a line from Fullerton which runs generally west of Fullerton.

Q. Is the gas flow then from Fullerton in the state of Texas, west into a point southerly of Eunice in the state of New Mexico? A. Yes, that is correct.

Q. And does that go on to Eunice station? A. Generally it does.

Q. Is part of that then part of the commingled stream that proceeds south to Pecos River station and then to Guadalupe? A. Yes, generally.

Q. Are there any other lines that in fact exist at the present time or are contemplated that cross the New Mexico-Texas border other than what we have already adverted to? A. There are some field lines that cross the border.

Q. Approximately how many are there that do that?

Presiding Examiner: Shown in Item B?

The Witness: Shown on Item B there are, I believe, three shown. There may be a very small number of others.

Presiding Examiner: This might be an appropriate time for our recess. We will take a ten-minute recess.

(Whereupon at 11:05 a.m., a recess was taken until 11:15 a.m.)

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Presiding Examiner: The hearing will be in order.

Mr. Ormasa: I believe we have a pending question, Mr. Hunsaker.

Presiding Examiner: There was no pending question.

By Mr. Ormasa:

Q. I think we were speaking about three field lines which cross the New Mexico-Texas border that we had not previously adverted to and you were about to describe those.

A. Item B by reference shows three field lines. There may be a few others.

Q. Could you set those forth in some particularity for the record, please? A. Yes. As shown on Item B by reference, there is a line which begins at the Phillips Winkler plant in Winkler County, Texas, and proceeds north up to the JAL 1 plant. There is a line in Texas which originates at Bedford in Andrews County and proceeds westerly to JAL No. 3. There is also a line which originates at the Dollarhide plant and proceeds west into New Mexico.

Q. Tell me this, Mr. Hunsaker: That Winkler line, does that go through the Keystone main line? A. No, sir, it does not.

Q. It is now in no way connected with the main line from the time it leaves the Winkler area until it reaches JAL No. 3?

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A. No.

Q. That gas then proceeds from JAL 3 as part of a common stream to Eunice, I gather, is that correct, sir? A. The Winkler line proceeds to JAL No. 1.

Q. Thank you.

JAL No. 1 rather than 3. It would then proceed from JAL No. 1 to where? A. It could go right now in two different directions. It could come back down the 30 inch O.D. line to Keystone main line, or it can go west in the 16 inch O.D. main line shown in black, which is a part of the California system as opposed to the new 16-inch line which is shown in blue.

Q. Is that one of what we have called the 5 lines? A. Yes.

Q. Under the proposal, what would be the direction of flow from JAL 1? A. It would not change.

Q. The flow would be the same? A. Yes.

Q. The Bedford gas proceeds, do I understand it correctly, northerly into New Mexico? A. Westerly into New Mexico.

353 (352)

Q. And where does that connect up with the lines running through that JAL area up to Eunice? A. The Bedford gas comes in at the JAL No. 3 plant, is

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processed and then goes into the 30-inch O. D. Sweet transfer line.

Q. What is that 30 inch Sweet transfer line? Where is that located? A. That runs north and south through the Lee County area and connects at Eunice main line station and Keystone main line station and it is the one we have referred to previously here.

Q. Now, on Item B by reference, do you have a copy of that? A. Yes, sir, I do.

Q. You have three areas that are circled, or sort of broken up as to the new facilities that are proposed to be built at the three different points, is that correct, sir? A. Yes, that is correct.

Q. Turning your attention to the Wasson station area, can you tell me, sir, what the present direction of flow is on the line shown within that circle? A. Yes. There is a single black line shown towards the bottom of the circle running generally east and west. The direction of flow on that line is from the Wasson plant to the east. It does not connect with the line that connects the Plains. The two black lines grouped together, gas from the Wasson plant to the lines that connect with Plains.

Q. That is the present flow?

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A. Yes, sir.

Q. What will be the flow of the proposed lines? A. The same.

Q. The same direction? A. Yes, sir. Now, of course, the red line will flow fuel gas back to the plant.

Q. That is what I am speaking about, the red line that

is proposed to be built. That will take gas from the—A. From the 31, or 30—I believe it is the 30-inch O.D. line, from that line back to the Wasson plant for fuel.

Q. At the same time you will be taking gas from the Wasson plant down into the main line, is that correct, sir? A. That is correct.

Q. That will be a duplicate facility then, is that correct, sir? A. Well, they would have two separate services.

Q. Wouldn't it be possible off the existing line to use the gas for fuel? A. It is now being done.

Q. Wouldn't that also be true at the other two points shown of Fullerton station and Melroy-Crane station? A. Yes.

Q. At each of those stations duplicate facilities would be built in order to physically permit gas to come off the main line to the station, is that correct?

**355**

A. That is correct.

Q. That would be contrary to present flow? A. That is correct.

Q. And the present gas is being used now to serve those stations? Perhaps I phrased that rather poorly? A. Yes.

Q. The answer is yes or that I phrased it poorly? A. The answer is yes to the question.

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**356**

Q. Now, returning to the Guadalupe Cornudas area, on Exhibit 7, what gas will be used to serve the compressor station at Cornudas? A. The gas from the proposed 16 inch O.D. line which we will identify as gas purchased from the Houston Pipe Line Company.

Q. Will any of the five-inch line gas be used at that

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point?

Let me ask you this: Is there presently a compressor station there? A. Yes, sir, there is.

Q. And the five line—let me rephrase that.

The gas coming out of the Pecos River area presently services that compressor station, is that correct, sir? A. Yes.

Q. Are you going to use instead of that gas the gas from the 16-inch line to service that station? A. Yes.

Q. It will be the same compressor station? A. Yes.

Q. Therefore, the lines coming from Pecos River will physically connect at Cornudas compressor station? A. Yes.

Q. It will be possible for you to use the gas coming down from Pecos River area if you desire. A. As fuel.

Q. Yes. A. We could if we were a mind to do that.

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Q. Do I understand correctly from Exhibit 9 that 384 million cubic feet per day will be proceeding from Eunice down to the Pecos River station in New Mexico? A. Yes.

Q. And the Source of that 384 million will be a commingled supply, some of which originally came from Texas and some of which came from New Mexico, is that correct, sir?

Mr. Horning: I will object to this. We have been over

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this all morning about where the source of the gas is at Eunice and how it gets down into the point of the five lines. There must be, I respectfully submit, an end to this kind of cross-examination.

Mr. Ormasa: I am merely asking, Your Honor, whether this specific volume, this figure set forth here, is tied to those two various sources that I mentioned. It is a very broad general question I think.

Presiding Examiner: What do you want to prove by that?

Mr. Ormasa: I want to prove that we have Texas and New Mexico gas proceeding through New Mexico back into Texas.

Presiding Examiner: Why don't you ask that question?

Mr. Ormasa: I will accept the modification, sir.

By Mr. Ormasa:

Q. Would you care to answer that question? A. I feel sure that from time to time we have had Texas gas come into Eunice and go southwest to Pecos River station.

Q. That will be true in the future, will it not? A. It may or may not. It depends on the production in that particular area, which is quite a variable thing.

Q. You are not going to change the direction of the gas flow coming down from that juncture near southwesterly of Plains? A. That is correct.

**361**

Q. It is correct that you will not change that at all? A. That is correct. We will not change the flow from what we propose in these exhibits.

Q. So you will be receiving gas from Texas and New Mexico which will proceed down back into Texas, is that correct, sir?

Mr. Horning: I object to that. That is the same question that Your Honor asked to be reframed. It was reframed and answered.

Presiding Examiner: I think the answer is obvious on the record.

Mr. Ormasa: Very well, Your Honor.

By Mr. Ormasa: Now, this will help things, Mr. Hunsaker. I want to kind of trace the various gases coming into Guadalupe and I want to tie that into what you show in

357 (361)

Exhibit 9. At Guadalupe station you will receive gas coming down from Eunice as shown on Exhibit 9? A. Yes.

Q. You will further receive gas at Guadalupe flowing through what we have called the Five Lines running generally from southern New Mexico north of Keystone, westerly across New Mexico and back into Guadalupe, is that correct, sir? A. Yes.

Q. And the capacity of those lines is as you have

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indicated on Exhibit 9—would you read those figures for the record, please? A. Exhibit 9 shows in the top three lines, 1184.3 million cubic feet per day. In the bottom two black lines, 129.98 million cubic feet per day.

Q. Does the figure shown coming from Eunice comprise a part of that total which you have just referred to? A. Yes. The totals I gave you were downstream at Pecos River and the Eunice gas comes in upstream of Pecos River.

Q. That would be all supplies then coming through New Mexico, is that correct, sir? A. Yes.

Q. Then coming up from Keystone you have the proposed 16 inch line which would bring in another what, 100 million cubic feet roughly per day? A. Yes, Exhibit 9 shows 109.31 million cubic feet per day.

Q. Now, until the line shown in blue on Exhibit 9 that is the line proposed of 18616, is actually physically built, gas will not proceed in the—the source of gas at the stations as shown on Exhibits 7 and 8, would not be the source of gas as you have shown it there, is that correct, sir?

Do you want the question read, Mr. Hunsaker?

The Witness: I think so. It was a little confusing.

(Question read.)

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The Witness: I think the question is still a little confusing to me, but I believe I understand what you are get-

ting at and the answer is until the 16-inch O.D. line is built then, of course, the only gas Guadalupe will see is the gas through the 5 lines that you have referred to this morning.

By Mr. Ormasa:

Q. The 18616 line has not been certificated? A. That is correct.

Q. In fact, no hearings have been held, is that correct, sir? A. That is correct.

Q. And no hearings are set at the present time insofar as you know? A. That is correct.

Q. And this proposal has been pending some two years or so, is that correct, sir? A. I am afraid so.

Q. Now, in that regard the proposal to build the 18616 line was not part of the original application, is that correct, sir? In 18616. A. No, it was not.

Presiding Examiner: I think you better specify what application. There are three or four, I think.

Mr. Ormasa: Was not part of the original application in

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18616?

By Mr. Ormasa:

Q. You so understood that, is that correct? A. Yes, and the answer is, it was not.

Q. As a matter of fact, it appeared for the first time as part of the fourth supplement to that application, is that correct, sir? A. That is correct.

Q. And that was in what—July, 1960, or thereabouts? A. That sounds about right.

. . . . . .

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Q. Mr. Hunsaker, we have been around this point all day, really, but isn't it a fact that every time you, in your Exhibits 7, 8, 9 and 10, you assume that certain gas, such as Houston gas, or Lo-Vaca gas; you have labeled it in your

exhibits and somewhat in your testimony that that actual gas will be used there. That is based on the assumption that—let me reframe that.

As a matter of physical fact, the gas that will be delivered at each of those points will be commingled gas; is that correct, sir? A. Yes. That is true I guess in all cases except, of course, Coquat and Sonora. It is commingled only to the extent that Lo-Vaca and Houston are commingled. Beyond that point it is commingled to that extent as well as to the additional extent of commingling with other Texas-produced gas.

Presiding Examiner: And including some New Mexico-produced gas beyond Pecos River and beyond Eunice?

The Witness: Yes, to the extent that gas flows south to Eunice, it would then blend with New Mexico-produced gas.

* * * * * * * * * * *

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By Mr. Knight:

Q. Inviting your attention to Item B, which is a system map of El Paso Natural Gas Company, I invite your attention to transcript page 160, and I will ask counsel to be kind enough to supply you with a copy of that.

Beginning with line 16, you refer to Houston Exhibits 9 and 10, and I believe that you explained in our previous session that Item B shows El Paso's facilities further west than are shown on Exhibits 9 and 10. In other words, Item B carries El Paso facilities clear on west to the Pacific Coast, and the California border; that is correct, is it not?

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A. Yes.

Q. Inviting your attention to transcript page 160, beginning with line 8, you say that the flow of gas will be continuous and downstream at all points from the source to its points of ultimate consumption within the State of Texas.

Now, that would apply also to the flow of El Paso's gas throughout the entire system, west, to California, would it not? A. Yes, the flow would be continuous and downstream.

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Q. Now, all of El Paso's existing facilities which are shown on the Exhibits 6, 7, 8, 9 and 10 are now using gas as fuel, are they not? A. Yes, sir, they surely are. I was just checking, Mr. Knight, to see if there was any exception. We do have a few electric compressors, but I don't believe any were shown on 6, 7, 8, or 9. A portion of the Leupp station is electric.

Q. But the exceptions are minor and very few? A. Definitely so.

Q. No change is proposed in that regard? A. No.

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[Exhibit No. 11]

EL PASO NATURAL GAS COMPANY
EL PASO, TEXAS

December 20, 1960

Address Reply To:
1006 Main Street—Room 19
Houston 2, Texas

Lo-Vaca Gathering Co.
Petroleum Tower
Corpus Christi, Texas

Gentlemen:

Reference is made to the Gas Purchase Contract dated May 16, 1960, between El Paso Natural Gas Company, as Buyer, and Lo-Vaca Gathering Co., as Seller, covering the purchase of gas in South Texas. Said contract is hereinafter called the "May 16, 1960 Contract."

Section 1 of Article II and Section 2 of Article XIV of the May 16, 1960 Contract are hereby amended by increasing the quantity of natural gas reserves dedicated to El Paso by two hundred forty (240) billion cubic feet, for a total dedication of six hundred forty (640) billion cubic feet. Section 2 of Article XIV is further amended by the substitution of the figure "eighty million (80,000,000)" for the figure "fifty million (50,000,000)."

The price to be paid by El Paso per one thousand (1,000) cubic feet for such additional two hundred forty (240) billion cubic feet of natural gas shall be the same price as provided for in Section 1 of Article X of the May 16, 1960 Contract, except as hereinafter provided. Lo-Vaca has advised El Paso that it has experienced difficulty in purchasing gas at its present prices to meet its obligations under the May 16, 1960 Contract, and that it desires to offer its gas producers a price escalation of up to two cents (2c) every four (4) year period rather than one cent (1c) every four (4) year period. El Paso therefore agrees that the price for such additional two hundred forty (240) billion cubic feet shall be adjusted to compensate Lo-Vaca for any such additional cost of gas, but in no event shall the price to be paid by El Paso be more than twenty-two cents (22c) during the first four (4) years, with increases of two cents (2c) for each four (4) year period thereafter.

Both El Paso and Lo-Vaca are in agreement that such additional two hundred forty (240) billion cubic feet of

* * * * * * * * * *

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gas may be sold and used outside of the State of Texas in interstate commerce. However, if prior to the acceptance of a Certificate of Public Convenience and Necessity by both parties there becomes available an intrastate market or use for this gas, El Paso agrees to allocate such additional two hundred forty (240) billion cubic feet of gas for such intra-

state market or use. It is expressly recognized that in any event such additional gas will be commingled in El Paso's pipeline system with the other gas being transported therein.

This agreement shall be effective as of the date hereof and shall remain in full force and effect for a term concurrent with the term of the May 16, 1960 Contract.

As hereby supplemented and modified, the May 16, 1960 Contract shall continue in full force and effect in accordance with the terms thereof.

If the foregoing correctly states Lo-Vac's understanding concerning the matters covered herein, it is requested that your Company indicate its acceptance hereof and agreement hereto by executing two of the enclosed copies of this letter in the space provided below and returning such executed copies to El Paso.

Very truly yours,

EL PASO NATURAL GAS COMPANY
By /s/ D. H. TUCKER
D. H. Tucker, Vice President

ATTEST:
By /s/ V. M. PLUMMER
V. M. Plummer,
Assistant Secretary

(Corporate Seal Affixed)

ACCEPTED AND AGREED TO:
LO-VACA GATHERING CO.
By /s/ O. S. WYATT, JR.
President

ATTEST:
By /s/ ELLIS M. BROWN
Secretary

(Corporate Seal Affixed)

382 *Minute entry of argument and submission—January 7, 1963*

[Omitted in printing]

383 In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

*versus*

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

*Opinion—September 24, 1963*

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

CAMERON, *Circuit Judge:* The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1]

384 The facts underlying the controversy presented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf (meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering

[1] The section outlining jurisdiction is 15 U.S.C.A. § 717(b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added.]

and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system." Ju-
> 385 risdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas. The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system, in Texas, the specified volumes of gas; that this gas will be commingled with gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical inmetering—out-metering will not be faithfully consummated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it
386 should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be

subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. § 717(b). See, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a different petroleum problem, "* * * the principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 1957, 5 Cir., 247 F. 2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No ques-
387 tion of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 8, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern*

*Pipe Line Company* v. *Public Service Commission of Indiana*, *supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be
388 made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two cases from the courts of appeal [2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States* v. *Public Utilities of California*, 1953, 345 U.S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use [3] in Nevada. Delivery of the power was made at a substation about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable . . . . But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies: in short, that the 'sales' themselves were separate * * *", pp. 317–318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]
389 *City of Hastings* v. *Federal Power Commission*, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal: The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City

[2] North Dakota v. Federal Power Commission, 1957, 8 Cir., 247 F. 2d 173; City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420.

[3] The Navy consumed some of the power and resold another portion.

[4] Pennsylvania Water and Power Co. v. Federal Power Commission, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota* v. *Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The ques-
390 tion phrased by the court was: "* * * does natural gas produced, wholesaled, transported, and sold for immediate consumption, solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce * * *?" [P. 176] The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

[5] In both North Dakota and Hastings, the Commissioner disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a

391 The Commission here seeks to distinguish *Hastings* and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the intial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States* v. *Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here, even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here.

392 Nor is there before us any question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest and most practi-

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passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the Commission to determine 'whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) • • • is identifiable'. United States v. P.U.C. of California, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

cal way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] . . . Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practive is not proper here." *Federal Tender Board No. 1* v. *Haynes Oil Co.*, 1935, 80 F. 2d 468, 469.[7]

393 We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of

[6] Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

[7] *See also Humble Oil and Refining Company* v. *Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 289 S.W. 2d 547, 552: "The fact that humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas it *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical
394 one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The substance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdictional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

ORDER VACATED.

RIVES, Circuit Judge, dissenting:

As shown in 15 U.S.C.A. § 717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are whether
395 the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca * * * at present owns no facilities and engages in no operations. By a contract dated May 16,

1960. Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

"'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, 396 that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

"Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

"* * * Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather

elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El
397 Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's
398 Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed * * * to supply its main-line compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to

West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day.

To give some semblance of physical delivery of
399 Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility" that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused

to let its jurisdiction turn upon the provisions of con-
400 tracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F. 2d 882, and its companion case, *Shell Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F. 2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout* v. *South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR* v. *Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co.* v. *Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co.* v. *Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular "restricted" use. In no previous case has jurisdiction been permit-
401 ted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by Lo-Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*, Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

402 In the United States Court of Appeals for the Fifth Circuit

October Term, 1962

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

*versus*

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

*Judgment—September 24, 1963.*

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; the petitioners' request that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court.

RIVES, *Circuit Judge*, dissents.

Issued as Mandate:

403 [File endorsement omitted]

406 No. 19478

In the United States Court of Appeals for the Fifth Circuit

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

*vs.*

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

*Petition for Rehearing En Banc—filed October 14, 1963*

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Come now the People of the State of California and the Public Utilities Commission of the State of California (California), intervenors, and pursuant to Rule 29 and Rule 25a of the Rules of the United States Court of Appeals for the Fifth Circuit, respectfully request rehearing *en banc* of this Court's decision of September 24, 1963, in the above-entitled proceeding, which was to review an order of the Federal Power Commission (Commission).

407 As ground for rehearing *en banc* California respectfully represents:

That the Court erred in concluding that an interstate stream of natural gas, destined for an interstate market, may be segregated by means of private contracts designed to make it appear that a portion of the whole interstate stream is nonjurisdictional, and thereby to remove such portion from the regulatory authority of the Commission.

Respectfully submitted.

RICHARD E. TUTTLE,
*Chief Counsel.*
J. CALVIN SIMPSON,
*Senior Counsel.*
JOHN T. MURPHY,
*Associate Counsel.*

October 11, 1963

CERTIFICATE OF COUNSEL

I, J. Calvin Simpson, do hereby certify that the within Petition for Rehearing En Banc, on the ground specified, is presented in good faith and not for delay.

Dated at San Francisco, California, this 11th day of October, 1963.

J. CALVIN SIMPSON.

*Attorney for the People of the State of California and the Public Utilities Commission of the State of California.*

467 [254] Cameron

In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

*v.*

FEDERAL POWER COMMISSION, RESPONDENT

SOUTHERN CALIFORNIA GAS COMPANY, ET AL, INTERVENOR-RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

*Order Denying Petition for Rehearing—December 17, 1963*

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

PER CURIAM:

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al as Intervernor-Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

"RIVES, *Circuit Judge*, dissents."

468 [Clerk's Certificates to foregoing transcript omitted in printing.]

469 Supreme Court of the United States
October Term, 1963

No. —

FEDERAL POWER COMMISSION, PETITIONER

*vs.*

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS CO.

*Order extending time to file Petition for Writ of Certiorari—March 10, 1964*

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1964.

HUGO L. BLACK,
*Associate Justice of the Supreme Court of the United States.*

Dated this 10th day of March, 1964.

470 Supreme Court of the United States

October Term, 1963

No. 914

PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

*vs.*

LO-VACA GATHERING COMPANY, ET AL.

*Order Allowing Certiorari—June 1, 1964*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 915 and 990 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

471 Supreme Court of the United States

October Term, 1963
No. 915

SOUTHERN CALIFORNIA GAS COMPANY, ET AL., PETITIONERS

*vs.*

LO-VACA GATHERING COMPANY, ET AL.

*Order Allowing Certiorari—June 1, 1964*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 914 and 990 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

472 Supreme Court of the United States

October Term, 1963
No. 990

FEDERAL POWER COMMISSION, PETITIONERS

*vs.*

LO-VACA GATHERING COMPANY, ET AL.

*Order Allowing Certiorari—June 1, 1964*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 914 and 915 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1964